THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FIBER SYSTEMS INTERNATIONAL, INC.,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION NO. 4:04CV348
v.	§	
	§	
ERNIE GONZALEZ,	§	JUDGE BROWN
	§	
Defendant.	§	
	§	
	§	
	§	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT ERNIE GONZALEZ'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(2) AND/OR, IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) AND BRIEF IN SUPPORT

Plaintiff Fiber Systems International, Inc. ("FSI") hereby files its Response in Opposition to Defendant Ernie Gonzalez's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) and/or, in the Alternative, Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Brief in Support as follows:

I. INTRODUCTION

Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) should be denied in its entirety because this Court has general and specific jurisdiction over Defendant. Specifically, Defendant traveled to Texas to conspire with Daniel Roehrs and other former officers and directors of FSI to commit a tort in Texas, fraudulently submitted an expense report to FSI in Texas, breached the express terms of an Employment Agreement with FSI in

Texas, and generally maintained contacts in Texas through his frequent business activities and trips to Texas while working with FSI, thus conferring jurisdiction upon him.

Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) should similarly be denied in its entirety because FSI has more than adequately stated claims against Defendant upon which relief can be granted. Specifically, FSI has stated a claim upon which relief can be granted for its breach of contract, conversion, theft and misappropriation of trade secrets, tortious interference, and unfair competition claims.

Therefore, as set forth below, Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) and/or in the Alternative, Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Brief in Support should be denied in its entirety.

II.
ARGUMENT AND AUTHORITIES

A. DEFENDANT'S RULE 12(b)(2) MOTION TO DISMISS SHOULD BE DENIED BECAUSE THIS COURT HAS JURISDICTION OVER DEFENDANT ERNIE GONZALEZ.

Defendant erroneously contends that this Court has no specific or general jurisdiction over him and that this case should therefore be dismissed. *See* Defendant's Motion to Dismiss, p. 2-5. As set forth below, however, Defendant's Motion to Dismiss should be denied on these grounds because: (i) specific jurisdiction exists against Defendant because he traveled to Texas to conspire with FSI's former officers and directors to commit a tort in Texas, fraudulently submitted an expense report to FSI in Texas that caused injury in Texas, and breached the express terms of an Employment Agreement with FSI that has caused injury in Texas; and (ii) general jurisdiction exists against Defendant because he has had continuous and systematic contacts with the State of Texas and Collin County through his employment with FSI, as evidenced by his frequent business trips to Texas and the fact that a significant portion of his business dealt with Texas. For these reasons, Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) should be denied in its entirety.

1. Standard of Review for a Rule 12(b)(2) Motion to Dismiss.

The Court can obtain jurisdiction over non-resident defendants who purposefully establish "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). "The appropriate inquiry is whether the defendant[s] purposefully availed [themselves] of the privilege of conducting activities in-state thereby invoking the benefits and protections of the forum state's laws." *Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir. 1990). This inquiry is itself a bipartite one. *Optimum Return LLC v. Cyberkatz Consulting, Inc.*, 2004 WL 827835, *1 (N.D. Tex. March 26, 2004). The court must first establish that the state's long-arm statute is sufficient to confer personal jurisdiction over the non-resident defendant. *See id.* If it does, then it must "resolve[] whether the exercise of jurisdiction is consistent with due process." *Id.* (citing *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 335 (5th Cir. 1999)). The Texas long-arm statute, TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-.045 (Vernon 1997), extends the jurisdiction of Texas courts "as far as the federal Constitutional requirements of due process will allow." *BMC Software Belgium, N.V. v. Marchand,* 83 S.W.3d 789, 794 (Tex. 2002). Therefore, the two requirements collapse into one, and the Court may obtain *in personam* jurisdiction over a non-resident defendant if such is within the limits of due process. *See Stuart v. Spademan*, 772 F.2d 1185, 1189 (5th Cir. 1985).

Personal jurisdiction can be established in two ways. First, the court can claim specific jurisdiction if "the nonresident defendant's contacts with the forum state arise from, or are directly related to, the cause of action." *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999). If the court is unable to find sufficient contacts to justify specific jurisdiction, it may rely on general jurisdiction "when a defendant's contacts with the forum state are unrelated to the cause of action, but are 'continuous and systematic.'" *Id.*; *see Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

The plaintiff only needs to prove a *prima facie* case of personal jurisdiction. *See Bullion*, 895 F.2d at 217. In this context, "prima facie" means that plaintiff has produced admissible evidence that, *if believed*, would be sufficient to establish personal jurisdiction. *See WNS, Inc. v. Farron*, 884 F.2d 200, 203-204 (5th Cir. 1989). Moreover, as in the case with any motion to dismiss, until an evidentiary hearing or a trial on the merits occurs, in examining a motion to dismiss for lack of personal jurisdiction, the court must take uncontroverted allegations in the plaintiff's complaint as true, and must resolve all conflicts in favor of the plaintiff. *See Bullion*, 895 F.2d at 217.

As set forth below, FSI has met the foregoing requirements and has demonstrated that this Court has specific and general jurisdiction over Defendant.

2. The Court Has Specific Jurisdiction Over Defendant Ernie Gonzalez.

This Court has specific jurisdiction over Defendant because he traveled to Texas to conspire with Daniel Roehrs and other former officers and directors of FSI to commit a tort in Texas, fraudulently submitted an expense report to FSI in Texas, and breached the express terms of an Employment Agreement with FSI in Texas.

(a) Specific jurisdiction exists because Defendant's conduct has caused injury to FSI in Texas.

Specific jurisdiction is established when the defendant "purposefully direct[s]" his activities at the residents of the forum, and the litigation results from alleged injuries that "arise out of or relate to" the defendant's activities *directed* at the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1984). It is well settled that a court may obtain specific jurisdiction over a non-resident defendant who has *never set foot in the forum* and can be incident to a single act *directed* at the forum. *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 211 (5th Cir. 1999); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 374 (5th Cir. 1987). Courts have repeatedly stated that the location of the *acts* is *irrelevant* because "[f]or purposes of long-arm jurisdiction, *a tort is committed where the resulting injury occurs*." *Admiral Ins. Co., Inc. v. Briggs*, 2002 WL 1461911, *6 (N.D. Tex. July 2, 2002) (citing *Magna Group, Inc. v. Gordon Floor Covering, Inc.* 1999 WL 1204483, *3 (N.D. Tex. 1999) (emphasis added). "When a nonresident defendant commits a tort within the state, *or an act outside the state that causes tortious injury within the state*, that tortious conduct amounts to sufficient minimum contacts with the state by the defendant to constitutionally permit courts within that state, including federal courts, to exercise personal adjudicative jurisdictions over the tortfeasor[.]" *Guidry*, 188 F.3d at 628 (emphasis added). Specific jurisdiction can be based on an act that took place outside of the state if the resulting injuries are seriously harmful and were intended or the foreseeable result of the defendants' conduct. *Id.* "When the act was done with the intention of causing the particular effects in the state, the state is likely to have judicial jurisdiction though the defendant had no other contact with the state." *Id.* (quoting American Law Institute, *Restatement (Second) of Conflict of Laws*, § 37 and cmt. E (1988 Revision)). As the Fifth Circuit has explained,

> [w]hen a nonresident defendant commits . . . an act outside the state that causes tortious injury within the state, that tortious conduct amounts to sufficient minimum contacts with the state by the defendant to constitutionally permit courts within that state, including federal courts, to exercise personal adjudicative jurisdiction over the tortfeasor and the causes of actions arising from its offenses or quasi-offenses.

Guidrey v. U.S. Tobacco Co., 188 F.3d 619, 628 (5th Cir. 1999) (citations omitted). As shown below, not only did Defendant commit tortious acts within the State of Texas, but even those acts that he may have committed from his home or elsewhere in Maryland, have caused injury within the State of Texas such that specific jurisdiction exists.

(b) Defendant traveled to Texas to conspire with Daniel Roehrs and others to commit a tort.

Defendant fails to offer any evidence or even attempt to contradict FSI's assertions made in its Original Complaint that "Gonzalez traveled to Allen, Texas on December 3, 2003 without authorization for the apparent purpose of conspiring to compete with and disrupt FSI's business." Plaintiff's Original Complaint, ¶ 13; *see also* ¶ 23. There cannot have been any legitimate FSI business purpose for Defendant to have traveled to Texas on that date because at that time, FSI was undergoing a management change after several years of contentious litigation. Further, FSI's former management team, including Daniel Roehrs, its former President, was at that exact time engaged in the illegal process of misappropriating FSI's trade secrets and confidential and proprietary information, as well as deleting, corrupting, downloading, and otherwise misappropriating information contained on FSI's computers, and also requesting remaining FSI employees to disrupt and otherwise "slow down" FSI's business once the current management left. These actions are all subject to lawsuits pending between FSI and these former officers and directors of FSI and have been thoroughly briefed in the District Court of Collin County, Texas as well as in Judge Schneider's Court in the United States District Court for the Eastern District of Texas.

Given the overwhelming evidence in those cases of the improper actions committed by these former FSI officers and directors, FSI contends that Defendant traveled to Texas to meet with these individuals on or about December 3, 2003 in order to participate in, or conspire to participate in, the misappropriation of trade secrets and confidential information, as well as the efforts to disrupt and otherwise "slow down" FSI's business operations once the former management team left. Given Defendant's meeting took place in Texas, that the tort accordingly took place in Texas, and also that FSI has suffered resulting injuries and damages in Texas, specific jurisdiction exists against him.

(c) Defendant fraudulently submitted an expense report to FSI that caused injury to FSI in Texas.

FSI's Original Complaint additionally provided that Defendant sought and received reimbursement from FSI for expenses allegedly incurred during the December 3, 2003 trip to Texas described above, totaling approximately $2,463.54. *See* Plaintiff's Original Complaint, ¶ 13 (and chart); ¶ 23 (and chart). In further support of FSI's allegations that personal jurisdiction is proper, the travel expenses submitted by Defendant for his unauthorized December 3, 2003, trip to Allen, Texas were approved by the new management of FSI before it was ascertained that Defendant's actions and conduct had harmed and injured FSI. *See* Affidavit of M. Roehrs, attached and incorporated herein as Exhibit A, ¶ 6. In its Original Complaint, FSI submitted a detailed summary of the charges contained on that expense report and evidencing the fact that Defendant spent several days in the Dallas metroplex area at that time. *See* Plaintiff's Original

Complaint, ¶ 13 (and chart); ¶ 23 (and chart). Most importantly, FSI is not aware that Defendant's December trip to Allen, Texas was mandatory or conditional on his employment with FSI. *See* Exhibit A, ¶ 6. Consequently, Defendant chose on his own accord to travel to Allen, Texas and thus avail himself to the courts of that jurisdiction.

To further buttress FSI's assertions that Defendant traveled to Allen, Texas in early December 2003, Daniel Roehrs, former President of FSI, has admitted under oath that he met with Defendant in Allen, Texas on December 6, 2003.[1] Daniel Roehrs also noted that this meeting did not occur at FSI's headquarters (because Daniel Roehrs had already departed from FSI) and that Defendant was trying to decide what to do with his future. *See* Exhibit B, p. 125, l. 1-9; p. 127, l. 4-22. Consequently, Defendant chose to travel to Texas in December 2003, without FSI's authorization and for activities not related to FSI's company business. As such, when Defendant submitted his expense report to FSI for reimbursement, he did so fraudulently, committed a tort in Texas, and caused injury to FSI in Texas. Therefore, this Court has specific jurisdiction over Defendants because he fraudulently submitted an expense report that has caused injury to FSI in Texas and Defendant's Motion to Dismiss should similarly be denied on these grounds.

(d) Defendant breached the express terms of his Employment Agreement with FSI and has thereby caused injury to FSI in Texas.

Defendant's contention, both through his own Affidavit, and the self-serving Affidavit of Daniel Roehrs, former President of FSI and one of the key individuals who has misappropriated FSI's trade secrets and confidential and proprietary information and otherwise attempted to unfairly compete against FSI, that he did not enter into an Employment Agreement with FSI rings hollow when confronted with the evidence that FSI has attached and incorporated herein. *See* Defendant's Motion to Dismiss, p. 4, and its Exhibits A and B. At the time that Defendant was hired, it was the express policy of FSI to have all of its employees enter into and sign Employment Agreements that contained, among other provisions, certain provisions expressly prohibiting the disclosure of FSI's confidential and proprietary information and also including certain non-compete provisions.[2] *See* Declaration of Danette Porter, attached and incorporated herein as Exhibit C, ¶¶ 3, 4. Moreover, Ernie Gonzalez's signed Employment Agreement was in FSI's Human Resources Manager, Danette Porter's, files up until the time that the former officers and directors left FSI in December of 2003. *See id.* at ¶ 4. Further, as evidenced by the e-mails attached to the Declaration of Michael Roehrs, it is clear that Defendant was informed of the Employment Agreement, reviewed it, and agreed to its terms as evidenced by his electronic signature contained on his acceptance letter. *See* Exhibit A, and its attachments.

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[1] Attached hereto as Exhibit B is a true and correct copy of the Declaration of Brian A. Colao. Paragraph 2 of this Declaration incorporates by reference the October 11, 2004 Oral Deposition Testimony of Daniel Roehrs, taken in *Fiber Systems International, Inc., et al. v. Daniel Roehrs, et al.*, Cause No. 296-03833-03, currently pending in the 296th District Court, in Collin County, Texas. *See* Exhibit B, ¶ 2.

Nevertheless, despite the non-disclosure and non-compete provisions contained in his Employment Agreement, Defendant has, upon information and belief, misappropriated FSI's trade secrets and confidential and proprietary information and has been otherwise unfairly competing against FSI in direct violation of his Employment Agreement with FSI. As such, this Court has specific jurisdiction over Defendant on these grounds as well because Defendant has

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2 The Affidavit of Daniel C. Roehrs, attached to Defendant's Motion to Dismiss, does not affirm nor deny that FSI company policy was to maintain Employee Agreements with all FSI employees. *See* Defendant's Motion to Dismiss, Exihibit B. Furthermore, FSI is currently pursuing legal action against Daniel Roehrs for his improper and unlawful conduct during and following his departure from the company, including the theft of documents and improper competition. *See Fiber Systems International, Inc. v. Daniel Roehrs, et al.*, Civil Action No. 4:04-CV-355, United States District Court, Eastern District of Texas; and *Fiber Systems International, Inc., et al. v. Daniel Roehrs, et al.*, Cause No. 296-03833-03, 296th District Court, Collin County, Texas. Accordingly, Daniel Roehrs's self-serving Affidavit cannot be given any weight as to its substance or veracity.

breached a contract with a Texas entity that has caused and is continuing to cause injury to FSI in Texas. Accordingly, Defendant's Motion to Dismiss should also be denied on these grounds.

3. The Court Has General Jurisdiction Over Ernie Gonzalez.

As set forth below, even if FSI has not met its burden to establish specific jurisdiction, which it has, Defendant's Rule 12(b)(2) Motion to Dismiss should be denied because FSI has clearly established that this Court has general jurisdiction over Defendant. This Court also has general jurisdiction over Defendant because during his employment with FSI, and at all times relevant to the claims made in this lawsuit, he established continuous and systematic contacts with Texas and Collin County through his employment with FSI by frequently traveling to Texas and having a portion of his business dealing with Texas.

Defendant claims that he only made "four trips to Texas during the period of time" during which he was employed by FSI. *See* Defendant's Motion to Dismiss, at its Exhibit A, Affidavit of Ernesto Gonzalez. Defendant has completely misrepresented his contacts with the State of Texas to this Court. During the fifteen months that Defendant was affiliated with FSI, from August of 2002 through December of 2003, as evidenced by the travel reports that Defendant himself filed with FSI and that Michael Roehrs has summarized in his Declaration attached hereto, Defendant made no fewer than *thirteen* separate trips to Texas (the Dallas metroplex area) accounting for a total of *sixty-five days* that he was in Texas during those fifteen months. *See* Exhibit A, ¶ 5. This hardly constitutes ties to Texas that are "extremely limited" as Defendant has stated in his Affidavit. *See* Defendant's Motion to Dismiss at its Exhibit A, Affidavit of Ernesto Gonzalez. In addition, Michael Roehrs personally saw Defendant in Allen, Texas on two occasions in late 2003. *See* Exhibit A, ¶ 4. Moreover, in his business dealings with FSI, Defendant has expressly admitted that 5% of his business was done in Texas. *See*

Defendant's Motion to Dismiss at its Exhibit A, Affidavit of Ernesto Gonzalez. These are precisely the types of "systematic and continuous" ties with Texas that are sufficient for this Court to have general jurisdiction over Defendant.

Accordingly, as evidenced by the "systematic and continuous" contacts that Defendant had with Texas during his employment with FSI and at all times relevant to the facts of this lawsuit, FSI has clearly demonstrated that this Court also has general jurisdiction over Defendant and his Motion to Dismiss should be denied on these grounds. Given that this Court has specific and general jurisdiction over Defendant, his Rule 12(b)(2) Motion to Dismiss should be denied in its entirety.

B. DEFENDANT'S RULE 12(b)(6) MOTION TO DISMISS SHOULD BE DENIED BECAUSE FSI HAS STATED CLAIMS UPON WHICH RELIEF CAN BE GRANTED.

Defendant also erroneously contends that this Court should dismiss this case because FSI has failed to state a claim upon which relief can be granted. *See* Defendant's Motion to Dismiss, p. 6-10. As set forth below, Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) should also be denied because FSI has more than met its pleading obligations necessary to comply with the liberally construed provisions of Federal Rules of Civil Procedure.

1. Standard of Review for a Rule 12(b)(6) Motion to Dismiss.

A plaintiff's "complaint should not be dismissed for failure to state a claim unless it appears ***beyond doubt*** that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (emphasis added); *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."). In reviewing a motion to dismiss, the court must accept the allegations of the plaintiff's complaint as true and draw all reasonable inferences in the plaintiff's favor. *See H.J., Inc. v. Northwestern Bell Tele. Co.*, 492 U.S. 229, 249 (1989); *see also Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 378 (5th Cir. 2002) (where no evidentiary hearing is provided, the plaintiff must make only a *prima facie* case and the court the must accept as true all of plaintiff's uncontroverted allegations); *Brown v. Nationsbank Corp.*, 188 F.3d 579, 585-86 (5th Cir.1999) ("The complaint must be liberally construed in favor of the plaintiff, and all of the facts pleaded must be taken as true.").

2. To the extent the Court considers Defendant's Affidavits determining Defendant's Rule 12(b)(6) Motion to Dismiss, the Motion becomes a motion for summary judgment, and FSI requests a continuance to conduct discovery.

Defendant has attached the Affidavits of Ernesto Gonzalez and of Daniel Roehrs to his Motion to Dismiss in order to, incorrectly, substantiate his claim that he did not have an Employment Agreement with FSI. *See* Defendant's Motion to Dismiss at its Exhibits A and B. Then in his argument section pertaining to his Rule 12(b)(6) Motion to Dismiss, Defendant specifically refers to FSI's purported failure to state its claims relating to the existence of this Employment Agreement. *See id.* at p. 7. To the extent that this Court intends to rely upon this attached evidence in order to make its determination, Defendant's Rule 12(b)(6) Motion to Dismiss must be considered a motion for summary judgment. *See Michigan Paytel Jt. V. v. City of Detroit*, 287 F.3d 527, 533 (6th Cir. 2002); *Marques v. Federal Reserve Bank*, 286 F.3d 1014, 1017 (7th Cir. 2002). In the event that this Court considers this evidence and converts Defendant's Motion to Dismiss to a motion for summary judgment, FSI respectfully requests that, pursuant to Federal Rule of Civil Procedure 56(f), a continuance be allowed such that FSI can conduct the discovery necessary to properly and accurately respond to Defendant's motion for summary judgment. In the event the Court does not see the necessity of considering the evidence attached to Defendant's Motion to Dismiss, then FSI respectfully requests that this Court deny Defendant's Motion as set forth below.

3. FSI Has Stated A Claim Upon Which Relief Can Be Granted as to All of the Causes of Action it Has Asserted Against Defendant.

Defendant seeks dismissal of virtually all of the claims asserted against him under Rule 12(b)(6). However, FSI properly pleaded all of its claims and, therefore, Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) should be denied.

(a) FSI's breach of contract claim states a claim upon which relief can be granted.

FSI has properly alleged a cause of action for breach of contract against Defendant. Specifically, in its Original Complaint, FSI alleged that a valid and enforceable Employment Agreement existed between FSI and Defendant. *See* Plaintiff's Original Complaint, ¶¶ 8-10. Additionally, FSI alleged specific provisions that were believed to be included in the Employment Agreement. *See* Plaintiff's Original Complaint, ¶ 9. FSI also noted that Defendant served as Regional Sales Manager and was responsible for sales of fiber optic products to the United States Navy. *See* Plaintiff's Original Complaint, ¶ 8. FSI even reimbursed (unwittingly) travel expenses for Defendant thought to have occurred during the course of Defendant's employment. *See* Plaintiff's Original Complaint, ¶ 13. Defendant breached provisions of his Employment Agreement with FSI when began working with FSI's competitor, Delphi, and began communicating with FSI customers in attempts to steal them away. *See* Plaintiff's Original Complaint, ¶¶ 11-14. Moreover, "[u]pon information and belief, Gonzalez has been unlawfully using the confidential and proprietary information that he learned while employed by FSI to conduct business on behalf of and for the benefit of Delphi." *See* Plaintiff's Original

Complaint, ¶ 14. Obviously, FSI has alleged a proper claim for breach of contract and which satisfies not only the requirements of Rule 12(b)(6), but also the elements of this cause of action under Texas law. Consequently, dismissal of this claim is not proper.

(b) FSI's conversion claim states a claim upon which relief can be granted.

Defendant asserts that FSI's conversion claim fails because Defendant did not take any property. *See* Defendant's Motion to Dismiss, p. 8. In its Original Complaint, FSI alleges that Defendant "wrongfully took from the premises of FSI certain items which are the property of FSI, including computer hardware, customer files, customer lists, engineering and product designs, and other documents and files containing confidential, proprietary and/or privileged information and trade secrets." *See* Plaintiff's Original Complaint, ¶ 22. This description provides adequate identification of what property FSI believes Defendant has taken. Moreover, as FSI has made clear, Defendant did not pay FSI for this property and does not have FSI's authority to possess or make use of it. *See* Plaintiff's Original Complaint, ¶ 24. Thus, dismissal of FSI's conversion claim is improper.

(c) FSI's theft and misappropriation of trade secrets claim states a claim upon which relief can be granted.

Defendant also seeks dismissal of FSI's claims for theft and misappropriation of trade secrets. *See* Defendant's Motion to Dismiss, p. 8. Defendant argues that FSI has not asserted that Defendant seeks to profit via commercial use. *See* Defendant's Motion to Dismiss, p. 8. However, as identified in the facts of FSI's Original Complaint, Defendant "left his employment at FSI and began working for Delphi Corporation, a direct competitor of FSI." *See* Plaintiff's Original Complaint, ¶ 11; *see also* ¶ 25 (incorporating all other allegations into the claim for theft and misappropriation of trade secrets). Moreover, "[u]pon information and belief, Gonzalez has been unlawfully using the confidential and proprietary information that he learned while employed by FSI to conduct business on behalf of and for the benefit of Delphi." *See* Plaintiff's Original Complaint, ¶ 14; *see also* ¶ 25. Consequently, Defendant's contentions are meritless and dismissal of this cause of action should be denied.

(d) FSI's tortious interference and unfair competiton claims state a claim upon which relief can be granted.

Defendant also attempts to attack FSI's claims against Defendant for tortious interference and unfair competition. As FSI points out, Defendant had access to and was aware of various FSI confidential and proprietary information and trade secrets. *See* Plaintiff's Original Complaint, ¶¶ 8, 12. However, Defendant left his employment with FSI to begin working for a competing company. *See* Plaintiff's Original Complaint, ¶ 11. Since his departure, Defendant has engaged in activity to improperly solicit and obtain FSI's existing customers, directly interfering with existing contractual relationships and unfairly competing with FSI.[3] *See* Plaintiff's Original Complaint, ¶ 35. These allegations sufficiently meet and exceed the level of pleading necessary to overcome any attempt at dismissal pursuant to Rule 12(b)(6).

Accordingly, all of Defendant's assertions that FSI's Original Complaint (and virtually all of its causes of action) fail to state a claim upon which relief can be granted are unfounded. Defendant fails to show that FSI beyond all doubt cannot prove any set of facts in support of its claims. Consequently, all relief requested in Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) should be denied.

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[3] Defendant's fails to provide ***any*** authority for its assertion that "a likelihood of confusion" must exist "between the [sic] Fiber System's product and Ernie Gonzalez's product." *See* Defendant's Motion to Dismiss, p. 9. Accordingly, little, if any, weight can be even to the concept that this proposition must be identified before a claim for unfair competition may be pursued.

III.
CONCLUSION

As set forth above, Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) 12(b)(6) should be denied in its entirety because this Court has general and specific jurisdiction over Defendant. Specifically, Defendant traveled to Texas to conspire with Daniel Roehrs and other former officers and directors of FSI to commit a tort in Texas, fraudulently submitted an expense report to FSI in Texas, breached the express terms of an Employment Agreement with FSI in Texas, and generally maintained contacts in Texas through his frequent business activities and trips to Texas while working with FSI, thus conferring jurisdiction upon him.

Moreover, Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) should similarly be denied in its entirety because FSI has more than adequately stated claims against Defendant upon which relief can be granted. Specifically, FSI has stated a claim upon which relief can be granted for its breach of contract, conversion, theft and misappropriation of trade secrets, tortious interference, and unfair competition claims. In the event this Court considers the evidence attached to Defendant's Rule 12(b)(6) Motion to Dismiss, FSI respectfully requests that a continuance be granted under Rule 56(f) so that FSI may conduct discovery necessary to respond to a motion for summary judgment.

Therefore, as set as set forth above, Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) and/or in the Alternative, Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Brief in Support should be denied in its entirety.

IV.
PRAYER

WHEREFORE, premises considered, Plaintiff Fiber Systems International, Inc. respectfully requests that the Court: (i) deny Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2); (ii) deny all relief requested under Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) or grant FSI a continuance in order to conduct discovery should this Court consider the evidence attached to Defendant's Motion to Dismiss; and (iii) grant FSI such other and further relief, at law or in equity, as the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served ***via certified mail return receipt requested,*** on the 1st day of November, 2004 to the Defendants' counsel of record:

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